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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 469

THE CITY OF MURFREESBORO, TENNESSEE,
Petitioner,

v.

RUTHERFORD COUNTY, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Chancery Court for Rutherford County, Tennessee (App. B to Petition, pp. 31-34) is unreported. The opinion of the Supreme Court of Tennessee (App. B to Petition, pp. 25-30) is reported unofficially at 326 S. W. 2d 653. There was no dissent.

JURISDICTION.

One of the basic jurisdictional requisites to review by writ of certiorari is lacking here. The judgment of the Tennessee Supreme Court is not final, as is required by 28 U. S. C. § 1257. The judgment of the Supreme Court of Tennessee entered on July 27, 1959 merely affirmed the overruling of a demurrer to the bill of complaint (R. 134).

In the State of Tennessee, further defenses may be raised after a demurrer has been overruled. Tenn. Code Ann., § 20-915.

A state court judgment overruling a demurrer normally lacks the requisite finality for review. *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608 (1892); *Werner v. City Council of Charleston*, 151 U. S. 360 (1894).

The petitioner may elect to deny the amount claimed is correct, plead laches or estoppel, accord and satisfaction, or make other defense to the bill of complaint.

The bill of complaint also avers that the sums collected by petitioner for which respondent seeks judgment are subject to adjustment at the end of each calendar year (R. 12). The lower court will therefore be required to determine the amount for which judgment is to be entered, even if no further defense is interposed by the petitioner. As a rule, the Supreme Court will not review state court judgments which leave it to the lower court to ascertain an account upon which a decree is to be entered. *California Nat. Bank v. Stateler*, 171 U. S. 447 (1898); *Sand Springs Home v. Naharkey*, 299 U. S. 588 (1936).

Further discretionary action on the part of the lower court is here contemplated, and the judgment is not final so as to permit review by the Supreme Court.

QUESTION PRESENTED.

Whether the petitioner is required by contract with the Tennessee Valley Authority, executed under the provisions of a 1940 amendment to the Tennessee Valley Authority Act of 1933, to distribute to the respondent such part of the payments in lieu of taxes paid to petitioner's general fund by the municipal power distributor as are calculated by application of the prevailing county tax rate to the depreciated value of the distribution system property plus working capital.

STATUTE INVOLVED.

The pertinent provision of the 1940 amendment to the Tennessee Valley Authority Act (54 Stat. 626, 16 U. S. C. A., § 831 l), is set forth in Appendix A to the Petition at page 23.

STATEMENT.

On November 17, 1958, Rutherford County, Tennessee filed its bill of complaint to recover from the City of Murfreesboro, Tennessee, a sum of money in excess of $39,000.00 (R. 5 and 11). The County asserted that these funds represented the county portion of payments in lieu of taxes which were received into the general fund of the City out of the operating revenues of the municipally-owned electric distribution system (R. 11-12).

The total amount of payments in lieu of taxes so received into the City's general fund was calculated by applying the prevailing municipal and county property tax rates to the depreciated value of the distribution system property within the respective taxing jurisdictions, plus working capital (R. 11-12).

The authority to collect such payments in lieu of taxes is embodied in a power re-sale contract between the Tennessee Valley Authority and the City of Murfreesboro entered into on the 23rd day of April, 1957 (R. 6-7). This contract makes it the responsibility of the City ". . . to provide for such distribution as may be required by law or as it deems appropriate under the provisions of section 13 of the TVA Act to the . . . counties . . . of any tax equivalents so collected by Municipality in lieu of . . . county . . . taxes" (R. 9 and 25).

As amended in 1940, Section 13 of the TVA Act thus referred to in the contract places a limitation on the power of the Tennessee Valley Authority to authorize collection of payments in lieu of taxes by requiring that their collection, where permitted, be ". . ., conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of . . . county taxes upon any such distribution system or property; . . .". 54 Stat. 626, 16 U. S. C., § 831 l (1940).

The City of Murfreesboro has made no distribution of any part of the payments in lieu of taxes collected by it under authority of this contract to Rutherford County (R. 12).

The City, by demurrer to the bill of complaint, asserted that these facts were insufficient in law to entitle the County to any legal or equitable interest in the payments in lieu of taxes for which it sued (R. 29).

The Chancery Court upheld respondent's contention that the demurrer was not well taken and that

> "The congressional intent is that the county is entitled to the money and that the details and mechanics of its distribution are to be provided for by the local government" (App. B to Petition, p. 33).

The Supreme Court of Tennessee affirmed the judgment of the Chancery Court in an opinion from which there was no dissent (App. B to Petition, pp. 25-30).

ARGUMENT.

The issue presented here is of purely local significance. Of the fifty States, and other United States territories, only political subdivisions of those seven states in the TVA area could conceivably be affected by the outcome. One of these states, Kentucky, has already enforced distribution of payments in lieu of taxes by State legislation. Ky. Rev. Stats. 96-820. Existing Kentucky fiscal practices are therefore not affected at all.

Of the remaining states of the TVA area, Georgia is not affected at all, because there is not a single municipal or county distributor purchasing electricity under contract with TVA. *TVA Annual Report*, 1958, Appendix B, pp. A 38-39.

There is only one municipal distributor contracting with TVA in each of the states of Virginia and North Carolina. *TVA Annual Report*, 1958, Appendix B, pp. A 38-39.

In actuality, the issue here is of substantial interest in only three states—Tennessee, Alabama and Mississippi. Of the 90 municipal and county distributors contracting with TVA in these three states, 59 are located within the boundaries of the State of Tennessee. *TVA Annual Report*, 1958, pp. A 38-39. There are thus only thirty-one in the states of Alabama and Mississippi combined.

The issue presented here is manifestly of little concern outside the borders of Tennessee.

No conflict of decision with the decisions of any other court is even asserted by the petitioner, and the conflict with an administrative interpretation which is asserted does not exist. On the basis of the language of the statute and contract in question and the legislative history, the decision of the Chancery Court and the Tennessee Supreme Court was manifestly correct. There is thus no important question of Federal Law requiring decision by this Court.

I.

There Is No Conflict With Any Administrative Interpretation.

Petitioner seeks to persuade the Court that the Tennessee Valley Authority has made an administrative interpretation of the 1940 amendment to the TVA Act with which the decision of the Tennessee Supreme Court is in conflict. The quotations from the Report of the Board of Directors of the TVA to Congress included in Appendix E of the petition, pp. 41-43, are largely relied upon in support of this assertion. This report was not relied upon in either of the Courts below.

These quotations do not purport to recite how TVA interprets the 1940 amendment. Indeed the quoted report does not even mention the 1940 amendment or the section of the TVA Act which it became. It is also safe to assume that had any other report since 1944 made any mention of this 1940 amendment in any fashion that could remotely be regarded as an interpretation or construction, the petitioner would have included it in the petition. The Board simply states what practice has been adopted by most of the municipal distributors in disposing of payments in lieu of taxes. The Board did not, and was not called upon, to make any interpretation.

Nor does the contract between TVA and the City of Murfreesboro represent or establish any administrative interpretation of the 1940 amendment. The contract requires the city to ". . . provide for such distribution as may be required by law or as it deems appropriate under the provisions of Section 13 of the TVA Act . . .". As was pointed out by the Tennessee Supreme Court in its opinion, this language of the contract actually constitutes

> ". . . a recognition of the responsibility of the municipality to make the distribution as required by the amendment, and that the words immediately fol-

lowing the opening words of the sentence are generalizations brought about by some uncertainty in the minds of the officials as to the meaning of the part of the 1940 amendment following the semicolon" (Petition, Appendix B, p. 30).

Even if the 1957 contract was in fact an interpretation, as insisted by petitioner, and contrary to the determination of the courts below, it would be an interpretation of quite recent origin. The issue presented could assume importance only if it presented a conflict between the lower court decision and **a well-established** construction given the statute by the administrative officials charged with its enforcement. See *Patterson v. Lamb*, 329 U. S. 539 (1947).

II.

The Decision Below Is Clearly Correct.

After a penetrating analysis of the language of the 1940 Amendment the Chancery Court concluded with reference thereto that ". . . the congressional purpose is to require municipalities, when they exact county tax equivalents from their electric distribution systems, to restore to the counties the taxes lost" (App. B to Petition, p. 33).

The Supreme Court of Tennnessee, in a clear, concise opinion from which there was no dissent, stated:

> "We think it perfectly clear that the 1940 Amendment means, if we may be permitted to paraphrase, that TVA has the discretion in making such contracts with municipalities either to include a provision for tax equivalent payments as therein described or to omit any such provisions; but if such a provision be included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of State or County taxes upon any such distribution system or property" (App. B to Petition, p. 28).

To contend that the proper construction of the 1940 Amendment is contrary to that determined by the courts below is to ignore the plain language of the amendment and its legislative history.

A. The Language of the Statute. The 1940 amendment specifically limits the authority of TVA to include tax equivalent provisions in its power re-sale contracts by stating that the right to include same is ". . . conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property." 54 Stat. 626, 16 U. S. C., § 831 l (App. A to Petition, p. 23). To use the language of the Tennessee Supreme Court with reference to the pertinent portion of the 1940 amendment,

> ". . . . the only discretion is that which is vested in TVA whether to include the provision for payment of tax equivalents, but if such provision be included, it is on condition that the municipality make proper distribution to the respective governmental units. This is made abundantly clear by the language following the semicolon" (App. B to Petition, p. 28).

The contention that the provision thus construed below was actually intended only "as a clarification of a grant of power to TVA" and not a limitation thereon is but an exercise in semantics that flies in the teeth of the rules of logic and grammatical construction. For, as the Tennessee Supreme Court observed, to contend as petitioner does

> ". . . it must be said that Congress used a good many words unnecessarily and pointlessly, because . . . under Sec. 10 of the TVA Act, the Authority had already had unlimited power to include such terms for re-sale as might be necessary or desirable for carrying out the purposes of the Act" (App. B to Petition, p. 28).

"Unlimited power" to contract needs no "clarification." The only logical explanation for the pertinent language in the 1940 amendment is therefore that it expressly limits this heretofore "unlimited power."

Petitioner infers that the decision in the former litigation between the parties (Rutherford County v. City of Murfreesboro, 304 S. W. 2d 635) is in some way controlling or persuasive in this case. However, in the former opinion itself the Supreme Court of Tennessee, by adoption of the Chancellor's opinion, specifically stated that the question of the construction of the 1940 amendment could not enter into that decision. At page 639 of the opinion this refusal to construe the 1940 amendment distinctly appears in the following language:

> "If the 1940 amendment has the effect contended for by complainant, it is not merely declaratory of existing law, but materially changes the law as it existed prior to its enactment. Furthermore, by imposing new duties on the city and depriving it of that to which it was previously entitled under the terms of its contract, it impairs the obligation of the contract between the city and T. V. A. Without regard to the constitutional question, the T. V. A. act itself provides that amendments shall not operate to impair the obligation of any contract made by T. V. A. under power conferred by the Act. 16 U. S. C. A., § 831bb."

B. **The Legislative Intent.** Although the language of the 1940 Amendment itself appears clearly and unambiguously to limit TVA contractual power, and thus to make further inquiry as to legislative intent unnecessary; the identical conclusion is reached from a collateral investigation of this congressional intent.

A federal court has been called upon to construe portions of the 1940 Amendment. In the case of *Tennessee Valley*

Authority v. Polk County, 68 F. Supp. 692, 694 (E. D. Tenn. 1945), the court concluded that

> "According to the tenor of section 13 of the TVA Act the object of the Congress was to render financial assistance to states and local governments in lieu of taxation. This is particularly reflected in the hearings before the appropriate committees which preceded the passing of the 1940 Amendment which has become said section 13.
>
> The Plaintiff acquired very valuable power properties and reservoir lands in the Tennessee Valley, which resulted in substantial tax losses to the states and counties in which these properties and lands had been heretofore privately owned. The result of which was particularly burdensome to the counties affected in their efforts to maintain their schools, other county facilities, and to provide reserve funds and pay interest on indebtedness evidenced by bonds.
>
> From the provisions of section 13 itself, from a study of Committees' hearings, and a consideration of the remedy sought to be effected by the legislation, I am convinced that, insofar as the counties are concerned, Congress intended to replace to each county the taxes lost on the property acquired by the plaintiff in such county. I think that a proper construction of section 13 relative to the rights of the counties will effectuate such intention."

For Congress to have intended replacement to counties of lost taxes in one portion of the amendment and something entirely different in another portion would be legislative schizophrenia—yet this is the contention of the petitioner.

The Supreme Court of Tennessee made an incontrovertible delineation of the inconsistency in petitioner's position, stating in its opinion

"The Chancellor cited and quoted from Tennessee Valley Authority v. Polk County (D. C. Tenn.), 68 Fed. Supp. 692, not because the case presented the same question of law as in the instant case, but to show the general intent of Congress by this 1940 amendment to replace to the counties the lost taxes; **it would be inconsistent to hold at the same time that Congress by this amendment had a different intention where contracts with municipalities are involved**" (Emphasis added).

(App. B to Petition, p. 30).

C. **Legislative History.** The legislative history of the amendment demonstrates that the language in question was intended precisely as it was construed below.

As initially proposed, S. 2925, which as modified became the 1940 amendment, did not include the language in question at all (App. C to Petition, p. 37). Had Congress desired to leave TVA unrestricted power with reference to tax equivalent payments, this original language was entirely sufficient. Furthermore had Congress intended a mere pious admonition to the parties concerned to distribute county tax equivalents to the counties, the original language amply sufficed.

However, Congress was not content with this initial language. By amendment offered from the floor of the Senate, this language was altered completely. 86 Cong. Rec. part 5, 5247 (April 30, 1940). This alteration, which replaced the original 41 words of the provision with 151 words, was presumably made for a purpose. That purpose is manifest from a comparison of the original language with the substituted language. Congress was not content to leave distribution of tax equivalents to the discretion of TVA, the states and municipalities.

The record of the Committee hearings on the bill and the debate on the floor does not precisely pinpoint the exact moment or cause of this Congressional afterthought. It appears by strong inference to have resulted from the testimony of a witness from the Alabama State Department of Revenue. This witness pointed out that the cities in Alabama had combined to prevent the passage of state legislation assuring the counties their respective shares of tax equivalents collected from consumers.

> Hearing Before a Sub-committee of the Committee on Agriculture and Forestry, United States Senate, Seventy-sixth Congress. Third Session on S. 2925, February 23, 1940, at pp. 33-34.

This inference is rendered stronger by the fact that the language ultimately adopted was offered by a Senator from Alabama.

III.

There Is No Important Question of Federal Law.

Petitioner insists that serious and far reaching implications of Federal Law are to be perceived in this controversy between one City and one County of the State of Tennessee. Although dire predictions of multiplicitous litigation and disruption of municipal operations are made, there is strangely no citation to any pending litigation, and no reason shown to anticipate a refusal to accept their highest court's decision as determinative on the part of at least the 59 of the municipal distributors which are located in Tennessee. Speculation that some cities in Tennessee will refuse to comply with the holding of the Court below, or that cities in some of the two other states to any degree involved will seek to persuade their courts that the 1940 amendment is meaningless does not make an important Federal question.

Nor does the completely unfounded and unsupported assertion that the TVA marketing program will be dis-

rupted suffice to create a Federal Question, important or otherwise. It is a matter of public knowledge that TVA power output is already insufficient to meet the requests of those groups seeking to purchase current. In the most recent session of Congress the so-called "TVA Self-financing Bill" was enacted, which authorized TVA to issue bonds in order to finance expansion of power production to meet current and anticipated future demands. 73 Stat. 280, 16 U. S. C. A. § 831 n-4. How the TVA could be affected one way or another by requiring the cities to share tax equivalents with counties in equitable fashion does not appear, in the petition or otherwise.

Petitioner apparently now abandons the insistence made below that a serious constitutional question of Federal invasion of state areas of responsibility results from a decision in the respondent's favor. However, Petitioner still pursues its effort to conjure up the spectre of Federal Interference in State areas of legislative authority under somewhat more moderate guise. The argument now runs, that the decision below "projects Federal authority" into state areas and "preempts for Congress the field of distribution of tax equivalents."

Petitioner is merely setting up straw men and urging that they be knocked down. If there has been a projection of Federal authority, it occurred years ago when Congress authorized TVA to exercise control over municipal functions through the device of the power resale contract provisions. In actuality, the conferral of even this broad discretion on TVA did not "project Federal Authority" into state matters, for as the Supreme Court of Tennessee so aptly observed:

> "No one has a right to purchase power for resale from TVA, but if it is desired to contract with TVA for power it must be upon terms agreeable to TVA that are within the powers granted by Congress and

such as are consistent with and directed toward the accomplishment of the overall object of TVA, as expressed in the Acts of Congress."

(App. B to Petition, p. 29.)

The cities then have complete freedom of choice—they can agree or not agree. This is something entirely different from an assertion of Congressional authority over local governmental units.

It is also difficult to see how "preemption", even if it does result, of a field which the States have largely ignored for twenty years can raise a serious Federal question. The one State—Kentucky—which Petitioner asserts has acted in the field will, by Petitioner's own admission, find its fiscal policy unchanged as a result of the decision below. This is hardly the stuff of which serious Federal questions are made.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

G. S. Ridley

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JAMES R. BROWNING, Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

CITY OF MURFREESBORO, TENNESSEE,
Petitioner,

vs.

RUTHERFORD COUNTY, TENNESSEE.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

BRIEF

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

BRIEF

For the Cities of Johnson City, Tennessee, Elizabethton, Tennessee, and Greeneville, Tennessee, for Amici Curiae.

This brief amici curiae is filed pursuant to paragraph 4 of Rule 42 for the neighboring Tennessee cities of Johnson City, Elizabethton, and Greeneville, political subdivisions of the State of Tennessee, in support of the petition for certiorari by the City of Murfreesboro, Tennessee. It is sponsored and signed by the authorized law officers of each of the named cities.

All three of the cities operate electric distribution systems, purchasing power at wholesale from Tennessee Valley Authority under long term power contracts. They are now being sued or are threatened with litigation by

the counties in which their municipal electric systems operate under the decision of the Supreme Court of Tennessee in the case of **Rutherford County v. Murfreesboro,** ... Tenn. ..., 326 S. W. (2d) 653, in which the City of Murfreesboro has petitioned this Court for a writ of certiorari. In the case of Johnson City suits have been filed by Washington County and Carter County and is threatened by Sullivan County, despite the fact that payments are made by Johnson City from electric system revenues to Washington County in amounts determined by contract with said county. In the case of Elizabethton suit has been filed by Carter County, and in the case of Greeneville the governing body of Greene County, on October 12, 1959, adopted a resolution authorizing the County Judge to file suit against the city of Greeneville for the collection of additional tax equivalents as may be due (payments in agreed amounts have been made previously) if some settlement is not made within sixty days from said date. Almost all of the State of Tennessee is served with TVA power, for the most part by distribution systems owned and operated by 53 separate municipalities, and the legal situation of the three cities filing this brief is similar to that of two score other cities in Tennessee.

Counsel will not impose upon the Court by duplicating the argument in the petition and brief of the City of Murfreesboro, but will merely amplify the fifth reason by the petitioner for the granting of the writ, which, in the judgment of *amici curiae*, has not been adequately presented by petitioner. The paragraph in question in petitioner's brief (page 11) reads as follows:

> "5. Avoidance of a multiplicity of litigation and of impairment of municipal functions in many of the cities purchasing power from TVA requires an early decision of the liability of the City of Murfreesboro to Rutherford County. Other cities in Tennessee from which counties seek recovery will file their suits

in or remove them to the Federal Courts. Unless this Court passes upon the question involved, it must also be litigated in the courts of other states in which there are municipal distribution systems buying power from TVA—Alabama, Mississippi, Virginia and North Carolina—or in the Federal courts in these states, or perhaps in both. Equally important, scores of cities will be unable to plan their municipal budgets and service programs, to the extent they depend on tax equivalent payments of the type outlawed by the Court below, until this Court decides the question presented."

The tax equivalent payments of the municipal electric systems to the general funds of the respective cities are a major source of the revenues required to carry on their functions. The precise impact upon the municipalities of Tennessee as a whole or upon the individual distributors cannot be determined from sources of which this Court may take judicial notice, but the general magnitude of the problem is plain from the figures given in TVA's Annual Reports. In the Annual Report for 1958 TVA reported that for the fiscal year 1958 the 150 distributors paid a total of about $8,500,000 in state and local taxes and tax equivalents. The municipal systems accounted for more than three-fourths of the combined revenues of 80.7 million dollars for all municipal and cooperative distributors (Table 3, pages A-38-A-40); and among the 99 municipal systems (excluding Memphis, which is no longer a distributor of TVA power) 53, including many of the largest, are in Tennessee (Table 3, *supra*).

Another indication of the magnitude of the problem as it confronts Tennessee municipalities may be derived from the combined financial statements for the fiscal year 1958 appearing on page 60 of the TVA Annual Report for 1958. This statement shows that the 99 municipal systems had a total depreciated plant investment as of June 30, 1958 of

$392,000,000. Under the TVA contract this entire investment, plus materials and supplies, was subject to tax equivalent payments based on the application of the full city, state and county tax rates. The municipal tax equivalent base upon which counties could claim payments would, therefore, be in the order of $400,000,000, a good deal more than half of it in Tennessee.

In the counties in which Johnson City, Elizabethton and Greeneville operate the 1958 county tax rates are as follows:

Washington	$3.80
Carter	5.86
Sullivan	2.82
Greene	3.00

The tax rate in Greeneville is now $3.00, the maximum allowed by its charter.

Acute embarrassment to municipal administration is created by uncertainty as to the validity of a major source of municipal revenue. Even if consideration of the problem is limited to the tax equivalent for a single tax year it is apparent that the cities which have relied on the full tax equivalents permitted by the TVA Act and the TVA contract, as interpreted by the TVA, must either find new tax sources, raise their tax rates, or reduce the level of municipal services at a time when more and more demands are being made upon the cities for expansion of such services.

If the validity of the interpretation of Section 13 of the TVA Act which was reached by the Court below were sustained by this Court the cities would perforce face this hard choice and attempt to find the solution which involved the least sacrifice of the public welfare. Convinced as they are that the decision is wrong for the reasons set forth in the petition of the City of Murfreesboro for writ of certiorari (pages 11-17), to institute new taxes or to raise the level of tax rates or to curtail already inadequate municipal

services would impose great and needless hardship upon the citizens of many of the cities of Tennessee.

The plight of the cities of Tennessee is greatly aggravated by the question of retroactivity of the decision of the Court below. In the earlier controversy between Rutherford County and the City of Murfreesboro the Supreme Court of Tennessee held that counties could not claim tax equivalents from cities which purchased power under power contracts with TVA executed before June 26, 1940, the effective date on which Section 13 was amended by adding the language upon which Rutherford County relies. **Rutherford County v. Murfreesboro**, 304 S. W. (2d) 635. The contract between TVA and Murfreesboro upon which the present suit is based was executed on April 23, 1957 (R. 6), and suit was brought on November 17, 1958. The City of Murfreesboro, therefore, has far less exposure to liability for back payments than many other cities. For those cities which entered into contracts shortly after June 26, 1940 there would now be nineteen years of exposure to claims by counties for failure to pay over amounts due to the counties under the provisions of the amended section 13, despite the fact that there was no basis for suspecting liability until the decision of this Court in the present case on July 27, 1959, and that TVA's consistent administrative interpretation of Section 13 of the TVA Act as amended by the act of June 26, 1940 was that the cities were under no obligation thereunder to make payments to counties (Petition, p. 17, and Appendix E; Memorandum for the Tennessee Valley Authority as Amicus Curiae, pp. 3 and 4).

In the case of the amici curiae the dates of the respective contracts are as follows:

Greeneville, March 30, 1945 (superseded by a new contract as of July 1, 1949);
Johnson City, March 2, 1945;
Elizabethton, August 3, 1944.